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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GUILLERMO MEDINA RUIZ,

Defendant and Appellant.

B267064

(Los Angeles County
Super. Ct. No. VA121567)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed in part, vacated in part, and remanded.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Guillermo Medina Ruiz (defendant) appeals from his conviction of possession of narcotics for sale and unlawful possession of a firearm and ammunition. He contends that the trial court erred in excluding evidence of citizen complaints against the investigating officer, and that the error deprived him of his constitutional right to present a defense. Defendant also contends, and respondent agrees, that the trial court imposed an unauthorized sentence on an enhancement allegation that was found not true. In addition, defendant requests review of the in camera search warrant hearing. We find no error in the trial court's search warrant review and no merit to defendant's claims of evidentiary and constitutional error. We thus affirm the judgment of conviction. However, we agree that the enhancement was unauthorized, and thus vacate the sentence and remand for resentencing within the trial court's discretion.

BACKGROUND

Defendant was charged as follows: count 1, possession of cocaine for sale, in violation of Health and Safety Code section 11351; count 2, possession of methamphetamine for sale, in violation of Health and Safety Code section 11378; count 3, possession of marijuana for sale, in violation of Health and Safety Code section 11359; counts 4, 6, and 7, felon in possession of a firearm, in violation of Penal Code section 12021, subdivision (a)(1)¹; and count 5, possession of ammunition in violation of section 12316, subdivision (b)(1). In addition, the information alleged as to counts 1 and 2 that defendant was personally armed with a firearm, within the meaning of section 12022, subdivision (c). The information further alleged pursuant to the "Three

¹ All further statutory references are to the Penal Code unless indicated otherwise.

Strikes” law (§§ 667, subd. (b)-(j) & 1170.12, subd. (a)-(d)) that defendant had been convicted of a prior serious or violent felony.

A jury found defendant guilty as charged, but found not true that defendant was personally armed with a firearm. The jury found true the allegation that defendant had suffered a prior strike conviction.

On August 18, 2015, the trial court sentenced defendant to a total term of 10 years 8 months in prison. With count 1 as the base term, the court imposed the low term of two years, doubled to four years as a second strike, plus four years for the section 12022, subdivision (c), enhancement (which the jury found not true). The court imposed eight months, one third the middle term, doubled to 16 months, as to each of counts 2 and 3, to run consecutively to the base term, and concurrent terms of two years as to each of the remaining counts. The court also imposed mandatory fines and fees, and calculated presentence custody credit as a total of 268 days.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Los Angeles Sheriff’s Department Detective Antonio Guillen and a team of approximately eight gang investigators executed a search warrant at defendant’s home on September 1, 2011. Defendant was in the front driveway of the apartment complex when the deputies arrived, and was detained in back seat of one of the patrol cars. Other deputies removed the family members inside, and detained them, in a side yard of the building. Detective Guillen explained the warrant to defendant and asked whether there were any guns in the home.² He then

² A video recording of the detective’s questions to defendant was played for the jury during the defense case. The recording

found defendant's wife (Mrs. Ruiz) with the other waiting family members and explained the nature of law enforcement's presence to her. He asked her whether there were guns or narcotics in the home. The other family members included defendant's nephew Jesus Ramirez (Ramirez), who was placed for awhile in the back seat of the patrol car with defendant, defendant's stepdaughter Ashley Gonzalez (Gonzalez), and defendant's daughter Teresa Ruiz (Teresa), as well as defendant's two sons who were both under two years old at the time.

Detective Guillen testified that when Mrs. Ruiz asked to say goodbye to defendant, she was taken to the patrol car, allowed to speak to him, and then taken back to the side yard. Detective Guillen denied telling her that if defendant did not admit ownership of items found in the home, he would have the children taken away by DCFS (Department of Children and Family Services). However, he did tell Mrs. Ruiz that DCFS could become involved. Detective Guillen also denied telling Mrs. Ruiz that during a search conducted about a week before, a woman's children were taken from her because her husband would not confess. Detective Guillen explained that though he did have a case approximately a week earlier during which a woman was arrested and her children were removed by DCFS, there was no husband or other adult at the scene. The arrested woman was the only adult who lived with her children, who could not be left alone. In such a case it is sheriff's department policy to call in DCFS.

has not been included in the record on appeal, and the transcript was not admitted into evidence. Appellate counsel represents here that the video showed defendant's confession in response to the detective's questions.

In their search of defendant's home, the deputies found what appeared to be marijuana, methamphetamine, and powder cocaine in a kitchen cabinet. Later testing revealed that there were 213 grams of methamphetamine, 33.2 grams of powder cocaine, and 515 grams of marijuana. In defendant's bedroom two iPhones in boxes, three walkie-talkies, a pink slip in defendant's name, an identification document in defendant's name, and a large amount of cash in a dresser drawer which also contained men's clothing were found. The amount of cash was later determined to be \$6,019. In the living room, three semiautomatic firearms and a box of live ammunition were found inside a speaker box. The firearms recovered were a .45-caliber and two nine-millimeter semiautomatic handguns, one with the serial number scratched off. The search failed to turn up any drug paraphernalia suggesting personal drug use, such as needles, pipes, rolling papers, or medical marijuana card. No receipts for the iPhones were found.

Detective Guillen testified as an expert in offenses involving possession of narcotics for sale. In his opinion, based upon the quantity found, the methamphetamine, cocaine, and marijuana were all possessed for the purposes of sale. He estimated the street value of the narcotics: \$2,500 to \$4,000 for 515 grams of marijuana; \$600 to \$800 for 33 grams of cocaine powder; and about \$5,000 for 213 grams of methamphetamine. Detective Guillen had never heard of anyone in possession of over a pound of marijuana for personal use.

After the search, Detective Guillen interviewed defendant at the station, and recounted defendant's statements in his

testimony.³ The detective denied telling defendant prior to the interview that he needed to cooperate or DCFS was just a phone call away, or that DCFS could go back and pick up his children without his being there. Detective Guillen gave defendant *Miranda* advisements,⁴ did not promise him anything, and did not threaten him. Defendant said he understood the advisements, and appeared to speak freely and voluntarily. Defendant admitted owing the guns and that they had possibly been stolen when he bought them on the street for \$450 each. He said that one of the guns did not work, although all of them appeared to Detective Guillen to be operational. Defendant said he was planning on selling the guns and the narcotics, except for the marijuana which he claimed was for personal use. Defendant claimed that the \$6,000 had come from food stamps and the shirts he sold. Defendant added that he had gone to court to try to get a patent for his T-shirt business. Detective Guillen asked him for receipts or paperwork for the iPhones, but defendant did not provide any. Nor did defendant ever provide a medical marijuana card. The interview was recorded, but the recording ended midsentence about a minute before the interview ended due to an error in downloading. Detective Guillen testified that defendant did not say that he had no choice but to cooperate “because of the kids,” during the last unrecorded moments of the interview.

Detective Guillen testified that no one other than defendant took the blame for the drugs, and that if anyone else

³ Although the video recording of the interview was played for the jury, the recording is not in the record on appeal, and the transcript was not admitted into evidence.

⁴ See *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445.

had done so, he would have questioned the person. Detective Guillen, who had qualified as a gang expert in other cases, testified that it was common for gang members to pass around gang-owned guns so specific people would not risk getting caught with them, while keeping them ready to use against rival gang members or to commit other crimes. He also testified that younger gang members were known to keep such guns and “take the rap” for older gang members who have been in prison and have put in a lot of work for the gang.

Defense evidence

A forensic fingerprint expert testified that he took fingerprints from the bags of narcotics, the box of ammunition, the three firearms, the magazine, and the ammunition, but none were identifiable. He described the firearms as two nine-millimeter guns and one .45-caliber. Finding no usable fingerprints on guns and plastic bags is not unusual.

Ramirez, defendant’s nephew, testified that he lived at defendant’s home at the time of the search, and was asleep on the living room couch when police arrived. The police handcuffed him and took him to the side of the house where he remained with his relatives for about 10 minutes. He heard Detective Guillen tell Mrs. Ruiz that if defendant did not confess to what they had found, they were going to take the kids away from her. Ramirez was then placed in a police car with defendant, and sometime later, they brought Mrs. Ruiz there. She told defendant that if he did not confess they would take the kids away. Ramirez tried to tell the officers that the things they found belonged to him, but they would not listen, and Detective Guillen told him to “shut the fuck up,” that he did not want to hear it, and then slammed the door in his face. The police took a video while he was in the police car and let him out of the car just before they left.

Ramirez testified that he was a methamphetamine user, that all the firearms and all the narcotics found were his, some intended for his personal use and some for selling. A friend gave him the narcotics and the guns, but Ramirez did not know where he had been given them or the friend's name. Ramirez denied being a gang member, but admitted he was currently charged with a gang related assault with a deadly weapon.

Defendant's sister and Ramirez's mother, Angelica Ruiz, testified that Ramirez began living with defendant in August 2011. Her son was a methamphetamine user, and after defendant was arrested in September, Ramirez told her that the guns and drugs belonged to him.

Sergeant Laura Lecrivain testified that she participated in the search, interviewed several people on camera, asking their dates of birth and whether there were large amounts of money, guns, or narcotics in the residence. She denied putting a gun in anyone's face, and did not tell a female not to do anything stupid, or throw her on a couch; nor did she accuse her of trying to escape. Sergeant Lecrivain did not hear any threat to call DCFS.

Gonzalez, defendant's stepdaughter, testified that she was 19 years old at time of search, and resided in the defendant's home. When the police arrived, she came into house from the backyard and asked what was happening. An officer grabbed her, put a gun to her face, said "Shut up. Don't be stupid," and pushed her to the couch. Deputies with guns drawn took her and the other family members to the side of the house. Detective Guillen was there. He pulled her mother to the side and told her that if her husband did not admit that everything was his, they would take the children. Mrs. Ruiz looked frightened and upset. Detective Guillen also told her that he had previously taken children from another couple because the husband would not admit to whatever they had in the house. Gonzalez claimed that

Ramirez had not yet been taken to the front of the complex, and she heard him tell Detective Guillen that everything belonged to him. She claimed that the detective told Ramirez to “shut the fuck up” and then pushed him to the ground. Gonzalez admitted that when she spoke to an investigator in May 2012, she did not tell him that an officer had pushed her cousin down, because the investigator did not ask.

Gonzalez testified that she and defendant worked together to print and sell T-shirts at swap meets, car shows, and to retailers. Most people paid cash, and defendant put the money aside to buy materials. It was their main source of income.

***Pitchess* motion⁵**

Early in pretrial proceedings, the trial court granted a *Pitchess* motion as to any complaints contained in Detective Guillen’s personnel records during the previous five years regarding false testimony, false police reports, or coercive interview tactics. After an in camera review of the records, the court found that six complaints fit the category, and ordered the contact information for the complainants be given to the defense. After the defense was only able to locate one of the complainants, the court ordered disclosure of any witness statements relating to the complaints.

Just before trial, defendant brought a motion to exclude his statements made at both the scene of the search and later in his interview. Detective Guillen testified much as he did later at

⁵ See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). A “*Pitchess* motion” is the procedure now codified in Evidence Code sections 1043 through 1045, by which criminal defendants may seek discovery of potentially exculpatory information in a peace officer’s confidential personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219-1220.)

trial, denying making any threats regarding DCFS. Defense counsel questioned him about the various complaints contained in his personnel file. Defendant then presented testimony of family members claiming to have heard the DCFS threats, as well as the testimony of one of the third-party citizen complainants, Demetrious Henry (Henry).

Henry testified to having filed three harassment complaints against Detective Guillen. He claimed to have been told by Detective Guillen that the detective would find a way to get back at Henry. Henry was on parole for possession of crack cocaine when he was arrested by Detective Guillen in 2008. He and his wife were seated in their car in the driveway when Detective Guillen and his partner arrived, took them out of their car, placed Henry in the back seat of the patrol car, and made Henry's wife stand against the car while it was searched. Henry testified that although his wife kept telling them she was ill, needed to use the restroom, and could not stand up long, they refused to let her sit down until she "like I guess had a seizure; fell out in the street on the hot pavement." After the paramedics were called for Henry's wife, Detective Guillen's partner locked Henry in the back seat of the patrol car and turned on the heater. The officers then stood over Henry's wife smirking and smiling while she was in the street "you know, having a seizure or whatever."

Henry added that it was around June and hot outside, and he could not breathe in the hot car. Henry claimed to have told the officers that he had asthma and took psychiatric medication, and this was why they turned on the heater. About 12 officers then arrived in six cars, searched his truck, finding nothing. Detective Guillen then insisted on going alone into the house to search, and then seized some items. Detective Guillen did not ask or tell Henry to admit anything. In November, Henry took a

plea deal so he could be with his dying wife. Henry testified that he told the judge that Detective Guillen's conduct was harassment, but the judge did not allow the defense because Henry was on parole. According to Henry the judge said he could take his complaint to federal court where they would probably rule in his favor.

After the trial court ruled that only the statements made after the *Miranda* waiver would be admitted, the prosecution moved to exclude all evidence obtained through *Pitchess* procedures. The trial court granted that motion, explaining that the witnesses at the scene could testify regarding any threats they heard about taking away the children if defendant did not confess, but any of the *Pitchess* evidence unrelated to this case was irrelevant and inadmissible. The court also denied defendant's request to cross-examine Detective Guillen regarding the citizen complaints, on that ground that it would be hearsay.

During a pause in Detective Guillen's trial testimony, and outside the jury's presence, defense counsel asked the court for leave to cross-examine the detective regarding the *Pitchess* evidence in order to establish custom and habit under Evidence Code section 1105. The court denied the request, ruling that the alleged threat to have the children taken away was too dissimilar to the complaint made by Henry. Later, defense counsel renewed the motion and asked to summarize the other citizen complaints to preserve the record. Three of the complaints, filed in February 2008, described the incident involving Henry and the heated car. Counsel described the other complaints as follows:

“[1] On March 3rd, 2007, Dayton Jones complained that . . . this officer detained Christopher Williams for expired registration, and he had an open container in his house [*sic*]. And effectively when Mr. Williams failed to cooperate with him, Detective Guillen had his vehicle towed and did not give . . .

him the proper paperwork to get it out of impound because of his failure to cooperate.”

“[2] April 17th, 2007, Gary McDonald said he was stopped for this reason. He was thrown in handcuffs and placed in the back of a cop car And when nothing was found, Detective Guillen took his cell phone and wouldn’t return his cell phone.”

“[3] Then on January 8, 2009, Inisha White filed a complaint for harassment. She stated that he stopped her in the driveway, searched her without possible [*sic*] cause, stated that he found marijuana in her vehicle, even though she claimed there was no marijuana in the vehicle”

“[4] February 27, 2009, Dayton Jones filed a complaint against that cop that he walked to an ice cream truck in the street. He was detained for no reason. He searched his home without any warrant or probable cause. He swung a baton at his dog. And again search, found marijuana; it was his son’s marijuana and he arrested him for possession of sales. And the son had came [*sic*] in and given a statement to Detective Guillen that it was his marijuana and he still arrested this gentleman for possession for sales . . . [a]nd charged him with child endangerment.”

The trial court once again denied the motion.

DISCUSSION

I. Exclusion of *Pitchess* evidence

Defendant contends that the trial court erred in excluding evidence of complaints against Detective Guillen which had been turned over to the defense after his *Pitchess* motion was granted early in pretrial proceedings. In particular, defendant contends that the trial court erred in ruling that some of the evidence was

not relevant, and he argues that the material was critical to the defense theory that Detective Guillen coerced defendant into confessing that the drugs and guns belonged to him. Defendant further contends that the error violated his constitutional right to present a defense.

“We review a trial court’s ruling excluding evidence on grounds of irrelevance (Evid. Code, § 350) for abuse of discretion. ““The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence.”” [Citation.]” (*People v. Thornton* (2007) 41 Cal.4th 391, 444.) “‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “The test of relevance is whether the evidence tends “logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” [Citation.]” (*People v. Heard* (2003) 31 Cal.4th 946, 973.)

We may not disturb the trial court’s ruling on the admissibility of evidence “except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) “Application of the ordinary rules of evidence, such as Evidence Code section 352, generally does not deprive the defendant of the opportunity to present a defense [citation].” (*People v. Snow* (2003) 30 Cal.4th 43, 90.)

Defendant offered the evidence only on the ground that it was relevant to prove custom and habit. “Plainly, evidence that the interrogating officers had a custom or habit of obtaining confessions by violence, force, threat, or unlawful aggressive

behavior would have been admissible on the issue of whether the confession had been coerced.” (*People v. Memro* (1985) 38 Cal.3d 658, 681, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; see Evid. Code, § 1105.) Custom or habit means “a consistent, semiautomatic response to a repeated situation. [Citations.]” (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926.) It is “established by evidence of repeated instances of *similar* conduct.” (*People v. Memro, supra*, at p. 681, italics added.)

Defendant has not identified any facts set forth in any of the complaints about the detective or in Henry’s testimony that describes repeated instances of conduct similar to threatening a suspect in order to coerce a confession. Indeed, there were no claims of threats or coerced confessions in any of the citizen complaints. The complaints dealt with alleged harassment, the detective’s apparent disbelief of claims of innocence or third-party attempts to take the blame, and discourteous, negligent, or health-endangering conduct. However, none bore any relationship to suspect interviews or confessions, and thus had no tendency in reason to prove that Detective Guillen had a habit or custom of coercing confessions. Under such circumstances, we cannot find that the trial court acted arbitrarily, capriciously, or in a patently absurd manner. As the trial court properly exercised its discretion under Evidence Code section 352, there was no violation of defendant’s constitutional right to present a defense. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684-685.)

Defendant contends that the evidence was also relevant to bolster the credibility of Gonzalez and Ramirez, who testified they heard the threats denied by Detective Guillen. As defendant offered the evidence only on the ground that it was relevant to prove custom and habit, our review is limited to the trial court’s determination that it was not admissible for that purpose. (See

People v. Marks (2003) 31 Cal.4th 197, 228-229 [party may not challenge exclusion of evidence on ground not presented in trial court].) In addition, during the pretrial hearing on the admissibility of the confessions, the trial court ruled that the citizen complaints other than Henry's were hearsay and were not admissible to attack Detective Guillen's credibility. When defendant renewed the motion to admit the complaints to show habit or custom, he did not offer to show a hearsay exception, give a nonhearsay reason to admit the complaints, or suggest they were admissible to impeach Detective Guillen's credibility. He thus has not preserved either ground for appeal. (See *People v. Hill* (1992) 3 Cal.4th 959, 989, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Moreover, if defendant had offered this evidence to attack Detective Guillen's credibility, the trial court would most certainly have excluded it under Evidence Code section 352, which gives the court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Defendant insists that he "had a federal constitutional right to present . . . his version of the facts." Since nothing in the citizen complaints relates to defendant's version of the facts, they would serve only to impeach Detective Guillen's credibility with character evidence. Impeachment evidence based solely on character, with no logical bearing on any material, disputed issue in the case, presents a collateral matter which may be excluded. (*People v. Contreras* (2013) 58 Cal.4th 123, 153.) "[T]he latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of

attrition over collateral credibility issues.’ [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 301.)

In addition, as respondent observes, Henry’s account lacked credibility. Henry claimed the incident occurred on a hot summer day in 2008, while the complaints filed by other citizens about the same incident were filed in February 2008. Henry claimed that the judge in his criminal case found that he had shown that the search was designed solely to harass him, but refused to rule it illegal because it was a parole search. As respondent notes, such searches are unreasonable even if the person to be searched is a parolee. (*People v. Sardinas* (2009) 170 Cal.App.4th 488, 495.) Allowing Henry’s testimony would have caused the proceedings to degenerate into a trial on the reasonableness of a five-year-old search, thereby having little probative value. We agree with respondent that it would necessitate an undue consumption of time which no reasonable judge would allow.

In sum, as the citizen complaints were so dissimilar to one another as well as to the facts of this case, and because they contained no facts relating to confessions, admissions, or suspect interviews, they would not have served to raise a reasonable inference that defendant’s confession was coerced in this case. We conclude that under any standard, the exclusion of the evidence was harmless. (See e.g. *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. Review of in camera hearing

Defendant filed motions to quash or traverse the search warrant, to disclose the identity of any confidential informant, and for unsealing of the search warrant affidavit, which had been sealed to protect identity of a confidential informant. Defendant asks that this court independently review the sealed record of the portion of the hearing on the motions held in camera.

A search warrant affidavit may be sealed in whole or in part if necessary to implement the Evidence Code section 1041 privilege or protect a confidential informant's identity. (*People v. Hobbs* (1994) 7 Cal.4th 948, 971; see Evid. Code, § 1042, subd. (b).) "When a defendant seeks to quash or traverse a warrant where a portion of the supporting affidavit has been sealed, the relevant materials are to be made available for in camera review by the trial court. [Citations.]" (*People v. Galland* (2008) 45 Cal.4th 354, 364; *Hobbs, supra*, at p. 963; see Evid. Code, § 915, subd. (b).) "The court should determine first whether there are sufficient grounds for maintaining the confidentiality of the informant's identity. If so, the court should then determine whether the sealing of the affidavit (or any portion thereof) 'is necessary to avoid revealing the informant's identity.' [Citation.] Once the affidavit is found to have been properly sealed, the court should proceed to determine 'whether, under the "totality of the circumstances" presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was "a fair probability" that contraband or evidence of a crime would be found in the place searched pursuant to the warrant' (if the defendant has moved to quash the warrant) or 'whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing' (if the defendant has moved to traverse the warrant). [Citation.]" (*Galland, supra*, at p. 654, citing and quoting *Hobbs, supra*, 7 Cal.4th at pp. 972, 974, 975.)

We have independently reviewed the record, including the sealed warrant affidavit and the sealed transcript of the testimony of Detective Guillen, the affiant. We conclude that the trial court made the appropriate determinations, properly sealed a portion of the search warrant affidavit, and correctly found that

under the totality of the circumstances, there was probable cause to find the described contraband or evidence on the premises.

There was thus no error in denying defendant's motions.

III. Unauthorized sentence

The trial court imposed a four-year enhancement under section 12022, subdivision (c), which requires a finding that the defendant was personally armed with a firearm. As the jury found that allegation not true, the enhancement was unauthorized and must be reversed. Defendant asks that the matter be remanded for resentencing, or in the alternative that this court strike the enhancement and modify the judgment accordingly.

While the appellate court has the power to modify unauthorized sentences, that power is limited to correcting nondiscretionary errors in the judgment. (*People v. Lawley* (2002) 27 Cal.4th 102, 172.) As the trial court chose count 1 as the base term and exercised its discretion to impose the low term of two years before imposing the unauthorized enhancement, the appropriate procedure is to remand for resentencing. The trial court may exercise its discretion in resentencing defendant, so long as the total aggregate term of the new sentence does not exceed the original aggregate term. (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 614-615.)

DISPOSITION

The judgment of conviction is affirmed, and the sentence is vacated. The matter is remanded for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT